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EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

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January 26, 1993

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 20554

Re: In the Matter of the Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation
MM Docket No. 92-266, FCC 92-544

Dear Secretary Searcy:

Enclosed are an original and nine copies of comments in response to the Commission's Notice of Proposed Rule Making, MM Docket No. 92-266 (released December 24, 1992). The comments are filed on behalf of the New York State Consumer Protection Board (CPB). Please provide each Commissioner a copy of our comments.

Any questions regarding these comments should be directed to the undersigned at (518) 474-1472. Thank you for your assistance in this matter.

Very truly yours,

Bob Cohen

Bob Cohen, Esq.
Deputy Counsel

Enclosures

Sent By Federal Express: January 26, 1992

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992;	MM Docket No. 92-266
Rate Regulation	

COMMENTS OF THE NEW YORK STATE CONSUMER PROTECTION BOARD

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By: Bob Cohen
Deputy Counsel

Dated: January 26, 1992

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	MM Docket No. 92-266

COMMENTS OF THE NEW YORK
STATE CONSUMER PROTECTION BOARD

The New York State Consumer Protection Board (CPB) submits these Comments in response to the Notice of Proposed Rulemaking ("Notice") adopted on December 10, 1992 by the Federal Communications Commission ("FCC" or "Commission") raising various issues related to the Commission's implementation of its ratemaking authority under the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or the "Act").

The CPB is an agency in the Executive Department of the State of New York with the responsibility of representing consumers before state and federal agencies and coordinating the consumer protection functions of New York State. The CPB has a vital interest in ensuring consumer access to affordable high quality cable television programming, and to adequate cable service. At this time, the CPB will address a few selected issues in the Notice which have a particularly significant impact on New York State consumers.

I. GENERAL ISSUES

1. In the Notice, the Commission sought comment as to "whether the purpose and the terms of the Cable Act embody a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act was enacted... or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases." Notice at 5.

The Act is clear on its face that Congress intended to force both average cable rates and the rates for selected systems charging rates higher than would be charged under competitive conditions to decline after the Act's effective date. Section 623(b)(1), the centerpiece of the Act's rate regulation scheme, directs the Commission to "ensure that the rates for the basic service tier are reasonable." Further, the House and Senate Conference Committee added language to that provision stating that the reasonableness standard was intended "to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates... that exceed the rates that would be charged ... if such cable system were subject to effective competition." Conference Report at 62.

Further, the Act included a Legislative Finding concluding that average monthly cable rates had increased almost three times as much as the Consumer Price Index since rate deregulation. Cable Act, § 2(a). This finding, combined with section 623(b)(1), makes clear that Congress believed monthly average basic cable rates nationally to be unreasonably high. Therefore, Congress directed the Commission to

address this problem through rate reductions where appropriate.

Moreover, in section 623(b)(2)(C) of the Act, Congress set out the factors which the FCC was to "take into account" in determining whether basic rates were reasonable. The first and therefore presumably most important factor [section 623(b)(2)(C)(i)] directs the FCC to take into account "the rates for cable systems... that are subject to effective competition...." Since at the time of the Act's passage, a majority of cable systems nationally were not subject to basic rate regulation, it is obvious that Congress believed that most systems in the nation at the time of enactment had "unreasonable" rates and should be forced to reduce such rates.

II. STANDARDS AND PROCEDURES FOR IDENTIFYING CABLE SYSTEMS SUBJECT TO RATE REGULATION FOR THE PROVISION OF CABLE SERVICE

As the FCC notes, the statute establishes three separate tests, any one of which if met would establish that a cable system is subject to effective competition and therefore not subject to municipal rate regulation. As the Commission summarizes in the Notice:

> The first [test] is satisfied if fewer than 30 percent of the households in the franchise area subscribe to a cable system. The second test is met if: the franchise area is (i) "served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area;" and (ii) "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area." The third [test is met if] the franchising authority is itself a multichannel video programming distributor and "offers video programming to at least 50% of the households in the franchise area." Notice at 6 [emphasis added].

2. We support the Commission's apparent conclusion that a minimum amount of programming and separate channels must be provided by a cable competitor to subscribers for it to constitute a "multichannel video programming distributor" under the statute. Notice at 8. First, the Act's definition of "multichannel video programming distributor" specifies on its face that the entity must make available to subscribers "multiple channels of video programming." Cable Act, § 602(12).

Further, the legislative history reflects a Congressional concern that the 1984 Cable Act's premise that competition from emerging video technologies would eventually restrain cable rates was faulty because competition had "failed to materialize." House Report at 26. Ample testimony has been presented to Congress and the FCC of the failure of emerging competitors to cable such as DBS and wireless cable to gain a foothold in the market due to the inability of such competitors to obtain from cable-affiliated programmers the quality programming which consumers expect to receive. In our view, the Commission cannot measure whether the Congressional goal of restraining cable rates through competition has been achieved without a minimum channel and programming requirement.[1]

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[1] We note that this analysis is consistent with testimony previously provided by municipalities to the FCC. For example, in the Commission's 1990 effective competition proceeding, municipal interests proposed a standard which would have relied on the availability of viable alternative sources of multichannel programming for the determination as to whether effective competition exists. The cities stated:

> "Comparable multichannel video programming" would be defined to include any system which offers video programming in a quantity, of a quality and at a price

3. However, we do not believe that comparability would exist under the proposed second statutory test for effective competition merely if a competitor offers multiple channels of video programming and the numerical tests for the offering of and subscription to competitive service under the second test are met." Notice at 8.

In our view, the inclusion of the word "comparable" programming to the second test evinces a Congressional concern that the quality of the programming offered by any multichannel competitor must be adequate -- i.e. the competitor must offer at least some of the quality programming packages consumers have come to expect. See supra, n.1.

III. THE FINDING OF EFFECTIVE COMPETITION

4. The CPB agrees with the FCC's view that its "finding" that effective competition exists should initially be based on the determination of the franchising authority. We agree that such an approach "would permit in many cases a more accurate and expeditious initial effective competition analysis than the Commission could undertake without local assistance." Notice at 13.

5. In our view, FCC regulations should permit local franchising authorities to submit a statement explaining why the authority cannot submit a certification that it is qualified to engage in cable

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comparable to programming provided by other multichannel program providers. In practical terms, one would count as competitors to a local cable system any alternative video systems which provide approximately the same number of channels of video programming and an array of programming comparable to that shown on the local cable system." Comments of the City of New York et. al., MM Docket No. 90-4, at 22 (filed April 6, 1990) [emphasis added].

regulation, thus enabling the FCC to exercise jurisdiction under section 623(a)(6) of the Act. Notice at 12.

As the Notice indicates, under section 623(a)(3) of the statute, in order to receive Commission certification to regulate basic cable rates, a local franchising authority must certify that: (i) its regulations are consistent with FCC rate regulations; (ii) it has the legal authority to adopt, and the personnel to administer such regulations; and (iii) that the authority's rate regulation rules "provide a reasonable opportunity for consideration of the views of interested parties." Further, under section 623(a)(6) of the Act, the Commission may exercise jurisdiction if, among other things, the Commission disapproves the franchising authority's certification.

In our view, many franchising authorities throughout the nation are too small to adopt standards rules in conformity with FCC rules, and lack sufficient personnel to engage in rate regulation in conformity with the Act. It would be a mockery of the Act's intent to require such a locality to go through the futile exercise of filing an insufficient certification under section 623(a)(3), only to have the Commission disapprove the certification. Permitting these localities to submit a statement in the first instance that they are unable to meet the requirements of section 623(a)(3) would be far more consistent with the goal of the Act to simplify the administration of rate regulation. Further, such a procedure would enable additional cable systems to be subject to regulation, thus furthering the Act's central purpose to keep cable rates at a reasonable level.

IV. REGULATIONS GOVERNING RATES FOR THE BASIC SERVICE TIER

As already stated, section 623(b)(1) of the Act requires the Commission to, by regulation, "ensure that the rates for the basic service tier are reasonable." Section 623(b) sets out seven factors which the Commission must take into account in order to carry out its obligation to ensure that basic service rates are reasonable. The Notice asks parties to comment on the Commission's tentative conclusion that Congress did not intend that the FCC give "greater or primary weight" to any of the statutory factors. Further, the Notice seeks comment as to whether Congress intended that the FCC should give primary weight to the goal of protecting subscribers of any cable system from rates higher than the rates which would be charged if the system were subject to effective competition. Notice at 20-1.

6. In our view, the Act and the legislative history makes clear that Congress intended that the Commission give primary or at least significantly greater weight to the goal of protecting subscribers of any cable system subject to regulation from rates higher than the rates which would be charged if the system were subject to effective competition. Notice at 21.

Significantly, as previously noted, the House and Senate conferees added language not derived from either the House or the Senate bill to section 623(b)(1) clarifying that the FCC's mandate to ensure that basic rates are at a reasonable level was intended "to achieve the goal of protecting subscribers of any [regulated] cable system... from rates... that exceed the rates that would be charged ... if such cable system were subject to effective competition." Similarly, the

Conference Committee added language that even the Commission's mandate to take into account a "reasonable profit" was limited by the FCC's obligations to subscribers under section 623(b)(1) to (i) ensure that basic cable rates were reasonable, and (ii) to protect against basic rates which were higher than would be charged if effective competition to the cable operator existed. Conference Report at 62-3.

The only reasonable presumption which follows from the language added by the House and Senate conferees is that all of the cost factors to be taken into account in section 623(b)(2) are limited by the Commission's single overriding mandate to restrict rates in regulated systems to no greater a level than would be charged if the system were subject to effective competition.

7. In the CPB's view, the Commission should design its regulations with the purpose of producing basic service rates that are generally lower than the rates in effect as of the date of enactment of the Cable Act of 1992. Notice at 21. As previously argued, the Act makes clear that Congress intended to force both average cable rates and the rates for selected systems charging rates greater than under competitive conditions to decline after the Act's enactment.

8. The CPB takes no position at this time as to whether the Commission should adopt a "benchmarking" or "cost-based" approach for regulation of rates on the basic service tier. Notice at 22. However, should the Commission select a benchmarking alternative as the primary mode of cable rate regulation, we believe that the Commission should by regulation permit those franchising authorities who demonstrate sufficient expertise and personnel to adopt a cost-of-service

methodology to do so. Some large localities may be able and willing to engage in cost-based population, particularly in states such as New York where a state cable commission exists or where the state public utility commission has a role in cable regulation. Notice at 22, 26.

V. CHANGES IN SERVICE TIERS

Section 623(b)(5)(C) of the Act requires the FCC to issue regulations to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under the Act. The provision specifies that charges "shall be based on the cost of such change." Further, charges may not exceed "nominal" amounts when "the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by similarly simple method."

9. We believe that the statute prohibits cable operators from making any profit on customer-initiated changes in service tiers, whether or not the cable operator has the ability to effectuate the change by computer or by a similarly simple method. Notice at 41. Section 623(b)(5)(C)'s language that charges for changes in tiers must be based on the "cost of such change" clearly evinces a Congressional concern to enable cable operators to recover only the nominal cost of a subscriber's change in service. If Congress had intended cable operators to make a reasonable profit on such changes, it would have explicitly permitted this, as it did elsewhere in the statute. See, e.g. Cable Act ` 623(b)(2)(C)(vii).

10. Further, cable operators should be able to charge only a

nominal fee for changes in service tiers at the subscriber's request, whether or not the cable operator has the ability to effectuate changes by a computer entry or by a similarly simple method. Notice at 41. Large fees for tier changes would likely preclude consumers from dropping premium services after a rate increase to an unreasonable level, due to the high transaction cost, thus thwarting the intent of the Act to keep rates for such tiers to a reasonable level.

We are aware of the possibility that the CPB's proposal might encourage some consumers to make service tier changes more frequently, for example, to view a particularly desirable movie or sporting event. We believe that this possibility can be minimized by the Commission permitting higher charges after a subscriber made more than a specified number of requests to change service in a single year.

VI. IMPLEMENTATION AND ENFORCEMENT

11. The CPB agrees with the Commission's view that (i) cable operators should be required to notify subscribers in writing of proposed rate increases at approximately the same time they notify franchising authorities of rate increases (i.e. at the billing cycle closest to thirty days before any proposed increase is effective); and that (ii) any interested parties, including subscribers, should be permitted to participate in the local franchising authority's rate-making proceedings. As the Notice implies, this position is consistent with the requirement in section 623(a)(3)(c) that franchising authorities certify that their rate regulation procedures "provide a reasonable opportunity for the consideration of the views of interested

parties." Notice at 44.

In addition to subscribers, we believe that the Commission's rate regulations should require that state and local governmental entities other than franchising authorities which under state or local law have a responsibility to regulate cable television or to represent subscriber interests be provided with notice of any proposed rate increase and the right to participate in local rate proceedings.[2] Many such agencies have significant expertise in cable television matters, and could be of considerable assistance to local franchising authorities in the rate-making process. Further, the responsibilities of many such agencies could be impacted by changes in basic cable rates in their state.

12. The CPB disagrees with the FCC's view that formal hearings should be precluded on proposed rate increases or rate-related disputes. We are aware of the "statutory emphasis on expedition." Notice at 44. However, public hearings are often the only means for subscribers and citizen organizations to express their views on important public policy issues, and therefore hearings should be permitted in appropriate cases. The Commission could eliminate the possibility of unnecessary pro-forma hearings by requiring hearings

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[2] For example, in New York, the CPB has the responsibility of representing consumers before state and federal agencies and coordinating the consumer protection functions of New York State. N.Y. Exec. Law `553. In addition, the Commission on Cable Television, among other things, is empowered to represent the interests of the people of the State before the FCC, and to confirm franchise agreements. N.Y. Exec. Law `` 812(3), 815(6), 821(1). Both agencies should therefore be considered "interested parties" in rate proceedings conducted by franchising authorities in this state.

only upon petition of a requisite percentage of subscribers (i.e. 1% of subscribers, with a maximum requirement of 250 petitioners).

VII. REGULATION OF CABLE PROGRAMMING SERVICES

As indicated in the Notice, section 623(c) of the Act requires the Commission to establish criteria for identifying, in individual cases, rates for the acquisition and distribution of "cable programming services" that are "unreasonable." The statute sets out six statutory factors which the FCC is directed to consider in establishing standards as to whether such rates are unreasonable. Further, section 623(c)(1)(B) requires the FCC to establish by regulation "fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any subscriber, franchising authority, or other relevant State or local government entity" who alleges that a rate violates the Commission's standards. Notice at 46-7.

13. Initially, we note that just as entities in state and local government with regulatory authority or a responsibility to represent subscriber interests such as the New York State Cable Commission and the CPB are "interested parties" entitled to participate in local basic rate regulation proceedings under section 623(a)(3)(c) of the Act, [see supra at 11 and n.2], such entities are "other relevant State or local government entities" entitled to file complaints under section 623(c)(1)(B) alleging rates for cable programming services are unreasonable. The FCC's regulations should specify this fact.

14. We totally reject the Commission's suggestion that Congress intended a more "egregious" standard to apply to a finding that a rate

for a cable programming service as opposed to for the basic tier is unreasonable. Notice at 49. Nothing in the legislative history suggests such a result. In fact, given that legal review of cable programming service rates is triggered by complaints from cable subscribers, a strong argument can be made that a more lax standard applies in this case.

15. We strongly believe that any tier consisting of a number of different premium services offered at a single package price is subject to regulation under the Act. Notice at 49. Section 623(l)(2) of the Act makes clear than only basic service and video programming which is "offered on a per channel or per program basis" is excluded from the definition of "cable programming service." In light of the clear intent of Congress to prevent evasions of the Act, and the narrow language used in section 623(l)(2), no justification exists for the FCC to create new exceptions by regulation.

16. While the CPB takes no position at this time as to which of the FCC's two suggested procedures for receipt of subscriber complaints discussed in paragraphs 98 through 101 of the Notice are superior, we agree with the Commission's understanding of the legislative history that such procedures must be sufficiently nontechnical to enable a non-lawyer to file complaints without the assistance of counsel; and that no prima facie showing need be made by the non-attorney that a rate is unreasonable. Notice at 50-1.

17. The CPB supports any means devised by the Commission to make the complaint process easy for the non-lawyer to utilize, including: (i) the designing of a standard form which would permit a subscriber

to check off any allegations which in his or her view constitute unreasonable rates; (ii) the inclusion of a clear plain language explanation of the requirements of the Act and a telephone number at the FCC or at the franchising authority where assistance may be obtained on such a form; and (iii) procedures enabling the FCC and/or the franchising authority to inform the complainant that his or her initial complaint was legally insufficient with leave to refile. Notice at 50-1.

18. We oppose any requirement that a subscriber who alleges that a rate for a cable programming service is unreasonable obtain the franchising authority's approval as a precondition to filing a valid complaint. Notice at 52. Such a requirement would contradict the plain language of section 623(b)(1)(B) of the Act which permits subscribers to make complaints directly to the Commission.

19. Finally, we agree with the FCC that section 623(c) of the Act permits the Commission to reduce rates for the class of subscribers who paid for a service tier for which the rate was subsequently determined to be unreasonable. Any other construction would make a mockery of the purposes of the statute by requiring each subscriber paying unreasonable rates to file a complaint, and would greatly impede the Commission's administration of the Act. Notice at 54.

VII. CONCLUSION

In summary, the Consumer Protection Board (CPB) urges strong rate regulations which effectuate the central purposes of the Act to keep basic and premium cable rates to a reasonable level, and to promote vigorous competition to the cable industry.

Respectfully submitted,

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Dated: January 26, 1992